

LAW OFFICES OF
FLECK, MATHER & STRUTZ, LTD.

400 East Broadway, Suite 600, Wells Fargo Bank Building

P. O. Box 2798, Bismarck, North Dakota 58502

Telephone: 701-223-6585 Facsimile: 701-222-4853 E-Mail: fms@flecklaw.com Website: www.flecklaw.com

GARY R. WOLBERG⁺
PAUL W. SUMMERS
BRIAN R. BJELLA^{**}
JOHN W. MORRISON
CURTIS L. WIKE^{**}

ALSO LICENSED IN:

* Minnesota
° Montana
+ Iowa
^ Wyoming
□ Nebraska

CRAIG C. SMITH[^]
SHANE A. HANSON
MICHAEL C. WALLER[°]
PETRA H. MANDIGO[□]
CHRISTOPHER D. FRIEZ

ERNEST R. FLECK
(1921-1995)
RUSSELL R. MATHER
(RETIRED)
WILLIAM A. STRUTZ
(RETIRED)

August 22, 2007

Ms. Illona A. Jeffcoat-Sacco
Executive Secretary
NORTH DAKOTA PUBLIC
SERVICE COMMISSION
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

Dear Ms. Jeffcoat-Sacco:

In re: Chapter 38-14.1 NDCC
Surface Coal Mining Permit
Coal Beneficiation Facility
Our File No. 266-28431

We are writing on behalf of The North American Coal Corporation ("NACCO"), requesting a jurisdictional determination pursuant to North Dakota Century Code Chapter 38-14.1 regarding a proposed coal beneficiation facility.

I. Introduction:

A joint venture between Great River Energy ("GRE") and NACCO, known as Great American Energy ("GAE"), is proposing to construct and operate a coal beneficiation facility (comprised of air dryers and air jigs).

NACCO's subsidiary, The Falkirk Mining Company ("Falkirk"), operates a surface coal mining facility located near Underwood, North Dakota. Pursuant to a coal sales contract, Falkirk sells coal produced from its mine to GRE for use in its Coal Creek Station electric generating station also located near Underwood, North Dakota. GRE will provide lignite to the GAE coal

beneficiation facility. The GAE coal beneficiation facility will be located within the existing plant site of the Coal Creek Station.

The purpose of the coal beneficiation facility is to enhance the marketability of North Dakota lignite by substantially increasing its BTU value. GRE intends to sell this beneficiated lignite to its proposed Spiritwood generating station near Spiritwood, North Dakota, and pay GAE a processing fee for beneficiating the lignite. GAE will purchase a portion of the lignite from GRE, beneficiate and sell it to other North Dakota end users who currently utilize out-of-state coal.

The GAE facility is not located within Falkirk's surface coal mining operation and will not be operated by Falkirk. The land on which the GAE facility is to be constructed will be leased by GRE to GAE.

Significantly, the GAE coal beneficiation facility will be physically connected to Coal Creek Station by conveyors and piping. The purpose of the piping is to provide steam heat as a source of power to GAE coal dryers and air jigs. The conveyor is to transport coal from Coal Creek Station to the GAE facility.

II. Mining Law and Regulation:

"Surface Coal Mining Operations" is defined in part to mean "activities affecting the surface of lands "in connection with" a surface coal mine. Such activities include . . . chemical or physical processing, and the cleaning, concentrating or other processing or preparation, and loading of coal at or near the mine site . . ." NDCC § 38-14.1-02(33)(a). "Surface Coal Mining Operations" also means "the areas upon which such activities occur or where such activities disturb the natural land surface." Such areas include any adjacent land the use of which is incidental to such activities such as processing areas resulting from or incident to such activities. NDCC § 38-14.1-02(33)(b). The federal Surface Mining Control and Reclamation Act ("SMCRA") contains virtually identical language is found at 30 USC § 1291(28).

It is unlawful for an operator to engage in surface coal mining operations without first obtaining a permit to do so from the Public Service Commission ("Commission"). NDCC § 38-14.1-10.

A "Coal Preparation Plant" is defined under North Dakota law to mean "a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating or other processing or preparation and includes facilities associated with coal preparation activities, including, but not limited to, the following: loading facilities, storage and stock pile facilities, sheds, shops, and other buildings, water treatment and water storage facilities, settling basins and impoundments, and coal processing and other waste disposal areas." NDAC § 69-05.2-01-02(11).

A permit to operate a coal preparation plant must be obtained from the Commission. NDAC 69-05.2-09-19(1). Again, federal law with virtually identical language is found at 30 CFR § 701.5 and 30 CFR § 827.11.

III. Issue Presented:

Whether the GAE coal beneficiation facility constitutes a “surface coal mining operation;” thus necessitating GAE obtaining a surface coal mining permit from the Public Service Commission (“Commission”).

NACCO, on behalf of GAE, believes that the coal beneficiation facility does not constitute a surface coal mining operation.

IV. Analysis:

A critical determination is what facilities are deemed “in connection with” a surface coal mining operation.

To answer this question; the courts, and state and federal agencies charged with such a determination, refer back to Office of Surface Mining Reclamation and Enforcement (“OSM”) final rules as set forth in the Federal Register at 53 FR 47378 and 53 FR 47384 (November 22, 1988) (“Final Rule”). The purpose for which was to clarify circumstances under which coal preparation plants and support facilities located outside of a permit area of a mine are subject to the permitting requirements of SMCRA.

OSM was concerned that a prior definition of “coal preparation” could be interpreted to regulate certain coal preparation plants which are not actually regulated under SMCRA. “More closely tracking the language of SMCRA in this final rule, OSMRE ensures that coal preparation activities that are carried out ‘in connection with’ a coal mine are appropriately regulated under SMCRA.” Final Rule at 47385.

OSM stated that the purpose of the Final Rule was to clarify that only offsite coal preparation plants that are “in connection with a coal mine” are subject to regulation. *Id.*

Excluded are facilities at the site of ultimate use. *Id.* Due to a change in definition, OSM could no longer treat facilities which handle coal as either “in connection with” a mine or with an end user, as it could when the definition of coal preparation was based on the separation of coal from its impurities. It cited, for example, facilities such as the docks at Baltimore, Maryland, and Long Beach, California, that may occasionally crush or size coal, and may also conduct “coal preparation” under the new definition. OSM clarified that it does not believe that such activities at those facilities are “in connection with a coal mine, or that (SMCRA) was intended to regulate the activities at such facilities.” *Id.*

OSM did note that the term “in connection with” is not defined. It was the desire not to define the phrase such that it would unduly restrict the discretion that regulatory authorities must have in order to make valid decisions about the applicability of SMCRA. *Id.*

Of significance, it was stated that OSM “continues to believe that the ability of mine operators, or coal handlers directly servicing such operators, to have control of processing operations is essential in establishing that a processing plant is being operated in connection with a coal mine.” *Id.* This is a critical and very important statement, which has the effect of exempting the GAE facility from the definition of a coal preparation plant. Falkirk does not have control over the GAE facility. The operations of the GAE facility do not depend on Falkirk’s requirements.

OSM went on to state that it is “only requiring regulatory authorities to extend their permit requirements as far into the stream of commerce as those activities over which mine operators and the coal handlers who directly serve them, such as coal processors, have or could have control of operations.” *Id.* Falkirk will not have control of the GAE coal beneficiation facility.

In the Final Rule, OSM went on to state that it “believes that geographic proximity, as well as the functional relationship between the mines and coal preparation plants, are proper factors to be considered by regulatory authorities when identifying off-site preparation plants which are operated in connection with a coal mine and therefore are subject to regulation under SMCRA.” *Id.* at 47386. In this case, the GAE facility is separated from the Falkirk Mine by approximately two miles. The mine has existed for over thirty years without the GAE facility, and thus the mine has no functional relationship to the GAE facility.

As stated by OSM, “there is nothing in the Act or its history that implies that SMCRA was meant to apply nation-wide to all industrial facilities that process coal irrespective of whether or not they are operating in connection with a coal mine.” *Id.* For example, OSM stated that Congress did not intend that “shipping areas,” regardless of their association with coal mines can be regulated under SMCRA. *Id.* at 47387.

OSM went on to state that “the purpose of this rule is to recognize that there are processing facilities other than those at the point of use that are not in connection with a coal mine, and to ensure that jurisdiction is extended only to preparation plants operating in connection with a coal mine.” *Id.* Thus, the Final Rule does not mandate that to be exempt the facility must be at the point of ultimate use; other facilities are also exempt. One of the purposes of the Final Rule was that OSM “wishes to appropriately limit and concisely state the jurisdiction provided in (SMCRA) over coal preparation which results from or is incident to an activity ‘in connection with’ a coal mine.” Thus, OSM revised the rules to incorporate the phrase “in connection with,” which is also in SMCRA. *Id.* at 47388.

OSM went on to state that it has not changed its interpretation that operations in connection with an end user are not operations in connection with a coal mine. "Coal preparation facilities which are being operated only in connection with another industrial facility, such as the power plant of concern to this commentator, does not operate in connection with a coal mine and are not subject to the rule." *Id.* at 47388. The GAE coal beneficiation facility is operated in connection with another industrial facility, Coal Creek Station, being physically connected by piping and conveyors.

OSM agreed that as SMCRA's primary emphasis is on reclamation and post mining land use; it would be inappropriate to extend SMCRA to industrial facilities designed for long-term use and not operated in connection with a coal mine. SMCRA is primarily a reclamation statute. *Id.* at 47389.

In a recent case, a federal court of appeals acknowledged that the Secretary of Interior's interpretation of provisions of SMCRA when the statute is silent or ambiguous are given deference if reasonable. The court recognized that SMCRA is a complex and puzzling statute, and in many cases raises a variety of issues as to its correct interpretation. *Citizens Coal Council v. Norton*, 330 F.3d 478, 481 (Cir. D.C. 2003).

OSM's interpretations set forth in the Final Rule clearly indicate that coal processing facilities for the purpose of the end user are not "in connection with" a surface coal mining operation.

This position was affirmed in the Interior Board of Land Appeals' decision in *Pacificorp v. Office of Surface Mining Reclamation and Enforcement*, IBLA 95-175, 143 IBLA 237 (1998). In this case, the mine operator also operated a preparation plant through a wholly owned subsidiary. The preparation plant was located on the site of a power plant. The coal processed at the plant was used by the adjacent power plant. The issue was whether the coal preparation plant must be permitted as a surface coal mining operation. The Board noted that under relevant Utah law that a permit is required for all coal preparation plants operating in connection with a coal mine, leaving unregulated only coal preparation plants operated solely in connection with an end user or operated without connection to a mine or end user. *Id.* at 242. The Board quoted with approval from the Final Rule that "OSM has not changed its interpretation that mining operations in connection with an end user are not operations in connection with a coal mine. Coal preparation facilities which are being operated only in connection with another industrial facility, such as the power plant of concern to this commentator, do not operate in connection with a coal mine and are not subject to the rule." *Id.* at 246.

Further quoting from regulatory history, "a facility will not be deemed to be operated in connection with a mine if it is located at the point of ultimate coal use unless it is also located at the site of the mine." *Id.* at 252. The Board stated that OSM has "expressly stated in that rule making that facilities as located at the point of ultimate coal use will not be required to obtain a permit unless the plant was located at the site of the mine." *Id.* at 252.

OSM “has not changed its interpretation that operations in connection with an end user are not operations in connection with a coal mine.” Thus, the Board concluded that the preparation plant was exempt from obtaining a permit. *Id.* at 253. The same is true of the GAE coal beneficiation facility.

In another related case, the Interior Board of Surface Mining and Reclamation Appeals held that a river terminal used exclusively for the preparation and loading of coal for river barge shipments, primarily to utilities, was not “in connection with a surface coal mine and thus did not need a permit.” *Western Engineering, Inc.*, 86 Id. 336, 1 IBSMA 202 (1979).

Of significance is a ruling from a federal court of appeals in one of the many challenges to SMCRA regulations. The issue was the extent of SMCRA’s jurisdiction over processing and support facilities. *National Wildlife Federation v. Hodel*, 839 F2d 694 (Cir.D.C. 1988). While upholding regulations providing jurisdiction over “processing areas” that are not necessarily at but near the mine site; the court also recognized that OSM only purports to regulate facilities which must be “at or near” and are also “in connection with” a surface coal mine as defined in 30 USC § 1291(28)(a).

The court stated that the phrase “resulting from or incident to” language in subsection (b) of the SMCRA definition, “clearly suggests a causal connection, which, while not indicating an element of geographic proximity, certainly does require some sort of limiting principle of proximate causation that is familiar to the courts in tort law. Otherwise, every support facility that could be considered a “but for” result of a surface coal mining operation would be subject to SMCRA regulation.” In addition, the court stated that “resulting from or incident to” with respect to a facility “connotes an element of proximity to that activity.” *Id.* at 745.

These statements by the Federal Court of Appeals that “resulting from or incident to” requires “some type of limiting principle of proximate causation” is very significant in determination of what processing facilities are subject to SMCRA. The most likely “proximate cause” is that the processing facility depends on the mine’s requirements. However, the GAE facility clearly does not depend upon Falkirk’s requirements. The Falkirk mine has existed for over 30 years without the GAE facility. The sole purpose of the GAE facility is to serve the “end user.”

In the Final Rule discussing support facilities, it was stated that OSM “would expect the economic dependence of a facility on a mine to be a critical element in determining the degree to which the facility results from or is incident to regulated mining activity.” Final Rule at 47381. However, in this case GAE is not economically dependent on the Falkirk mine. It is economically dependent on its end users, who desire the higher value BTU coal.

V. Environmental Considerations:

In some of the court and administrative law decisions, there was concern that if the coal processing plant was not regulated under SMCRA, that it would be left unregulated. However, there should be no such concerns regarding the GAE facility. First of all, the plant will require an air quality permit as issued by the North Dakota Department of Health. In addition, the reject material from the jigging and air drying operations will require a solid waste disposal permit, also issued by the North Dakota Department of Health. Thus, there should be no concern that the GAE facility would be left unregulated should the Commission determine it does not have jurisdiction under NDCC Chapter 38-14.1.

VI. Other Considerations:

Coal produced from mines in North Dakota is subject to the coal severance tax on a tonnage basis. NDCC Chapter 57-61.

However, coal beneficiation plants are taxed in an entirely different manner. “Coal beneficiation” is defined to mean “improving the physical, environmental, or combustion qualities of coal, but does not include crushing or treatment with dust suppressants or freeze-proofing agents.” NDCC § 57-60-01(2). A coal beneficiation facility is deemed for purposes of taxation only to be a “coal conversion facility.” NDCC § 57-60-01(3). Such facilities are taxed at the rate of 20¢ on each ton of 2000 pounds of coal of beneficiated coal produced for the purpose of sale, or 1¼% of the gross receipts derived from such facility for the preceding month, whichever amount is greater. NDCC § 57-60-02(6).

Thus, under North Dakota law; coal beneficiation facilities are clearly treated not as coal mines but as coal conversion facilities for purposes of taxation.

Also, Coal Creek Station as operated by GRE, is regulated by the federal Occupational Safety and Health Administration (“OSHA”) with respect to plant health and safety. A determination by the Commission that the GAE coal beneficiation facility constitutes a “surface coal mining operation” could make it subject to health and safety regulation by the federal Mine Safety and Health Administration (“MSHA”). However, a determination by the Commission that the GAE coal beneficiation facility does not constitute a “surface coal mining operation” would likely mean that the GAE facility will also be regulated by OSHA, thus avoiding bifurcated health and safety jurisdiction over inter-connected facilities.

VII. Conclusion:

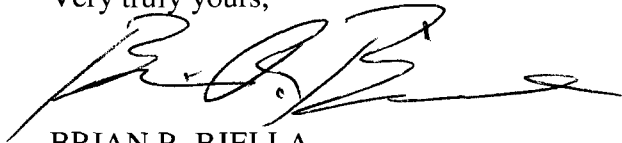
The proposed coal beneficiation facility of GAE is clearly not a “coal preparation plant” or “support facility” operated “in connection with” or “resulting from or incident to” a surface coal mining operation. It is not owned or operated by Falkirk. The coal from Falkirk is not sold to GAE, but to GRE. What happens with the coal thereafter is solely the determination of GRE.

The coal beneficiation facility is physically connected to GRE's Coal Creek Station not only by coal conveyors, but also by piping so as to provide the energy source to operate the GAE facility. The sole purpose of the GAE facility is to provide higher BTU value, beneficiated coal to end users.

OSM's own interpretation of the Final Rule does not merely exempt "coal preparation plants" constructed on the site of the ultimate end user, but clearly indicates that the rule also excludes processing facilities other than those at the point of the ultimate user that are not in connection with the coal mine. In this case, the ultimate user is power plants and large industrial users located in North Dakota who want to purchase this beneficiated lignite to meet environmental requirements.

The GAE coal beneficiation facility is not a "surface coal mining operation" under Chapter 38-14.1, NDCC. NACCO respectfully requests the Commission to concur in this determination.

Very truly yours,

A handwritten signature in black ink, appearing to read "B. R. Bjella", with a long horizontal flourish extending to the right.

BRIAN R. BJELLA

bw